IN THE
Supreme Court of the United States

No. 78-1585

STATE OF LOUISIANA, *Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

PETITION OF THE STATE OF LOUISIANA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION OF THE STATE OF LOUISIANA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The State of Louisiana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the court below (App. B, *infra*, pp. 3a-13a) is reported *sub nom Public Service Company of North Carolina, Inc., et al.* v. *Federal Energy Regulatory Commission* at 587 F.2d 716 (1979). The order of the court denying rehearing is included *infra* as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered January 11, 1979. The order denying rehearing was

entered February 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Section 7(b) of the Natural Gas Act of 1938, 15 U.S.C. § 717f(b), provides that "*no natural gas company*" shall abandon certain facilities or services without the approval of the [Federal Energy Regulatory] Commission first had and obtained." Section 2 of the Act, 15 U.S.C. § 717a, excludes state agencies from the statutory definition of "natural gas company."

The question is whether the requirements of section 7(b) apply to the states and to state agencies, even though state agencies are not "natural gas companies."

STATUTES INVOLVED

The relevant statutes, sections 2 and 7 of the Natural Gas Act of 1938, 15 U.S.C. §§ 717a, 717f, are set forth in App. F, *infra*, pp. 41a-42a.

STATEMENT

This petition requests review of a decision of the U.S. Court of Appeals for the Fifth Circuit affirming two declaratory orders of the Federal Power Commission.[1] The Commission orders[2] (App. C, D, *infra*)

[1] By the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (August 4, 1977), the Federal Energy Regulatory Commission succeeded to the functions of the Federal Power Commission. The term "Commission" will be used in this petition to refer to both the Federal Power Commission and the Federal Energy Regulatory Commission.

[2] Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandonment Authorization, Docket No. RP76-103 (April 26, 1977) (App. D, *infra*); Order Denying Rehearing (July 6, 1977) (App. C, *infra*).

asserted jurisdiction under the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*, over activities of the state of Texas. Such jurisdiction was asserted in the face of the Commission's own finding—in the orders themselves—that "the agencies of states, such as the School Land Board of Texas, are . . . in terms excluded from the jurisdiction of the Commission" (App. D, p. 23a).

The question before the Commission was whether the states are subject to the requirements of § 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), which provides in relevant part that:

> No natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained. . . .

In the declaratory orders, the Commission found first that the language of the Natural Gas Act excludes state agencies and states from the definition of "natural gas company" and therefore from the Commission's jurisdiction (App. D, *infra*, p. 31a). The Commission held, however, that it could nevertheless exercise jurisdiction over the sta[illegible] "where the context so requires." (App. D, p. 23a). The Fifth Circuit affirmed the exercise of jurisdiction over Texas, although it found the arguments for excluding Texas from the Commission's jurisdiction both "logical" and "consistent with the statutory language." (App. B, p. 7a). The Fifth Circuit believed that affirmance of the Commission was nevertheless required by this Court's recent decision in *California* v. *Southland Royalty Company*, 436 U.S. 519 (1978).

The Commission's declaratory orders dealt with the jurisdictional consequences of a proposed sale by Texas of certain state-owned royalty gas. The gas which Texas proposes to sell is now being delivered from state lands by Superior Oil Company ("Superior") to Natural Gas Pipeline Company of America, an interstate pipeline. The deliveries are being made by Superior pursuant to a 1971 certificate issued by the Commission to Superior which covered all of the gas produced by Superior from the leases, including Texas' royalty share.

On April 25, 1975, Texas gave notice of its election under the lease to take its royalty share in kind, and Texas entered into an agreement to sell the royalty share to Public Service Company of North Carolina ("Public Service"), a natural gas distribution company located in the state of North Carolina.

Public Service then petitioned the Commission for a declaratory order to the effect that section 7(b) does not require Texas to receive permission from the Commission before halting the sale of its gas to Natural. The Commission requested briefs on the issue, noting that the question presented "a case of first impression for the Commission" and that it raised "a fundamental question of jurisdiction" (App. E, p. 38a).

In its first declaratory order (App. D, *infra*) the Commission analyzed closely the language of the Natural Gas Act and concluded that "[n]either a state of the United States nor any state agency are natural gas companies subject to the jurisdiction of the Commission within the meaning of the Natural Gas Act" (App. D, p. 31a). The Commission found that the exclusion of the states from the reach of Commission jurisdiction was consistent with the overall legislative history and purpose of the Natural Gas Act. Citing this Court's decision in *Panhandle Eastern Pipeline Company* v. *Public Service Commission*, 332 U.S. 507, 517-518 (1947), the Commission emphasized that the Natural Gas Act "had no purpose or effect to cut down state power" (App. D, p. 25a).

The Commission did not, however, stop there. Despite its own conclusions about the language and intent of the Act, the Commission ventured that a state "may be subject to the Act where the context so requires" (App. D, p. 24a). The Commission then held that, since Superior had sold the state's royalty gas in interstate commerce, the requirements of § 7(b) attached to the gas itself and Texas could not withdraw its gas from sale in interstate commerce without first obtaining the permission of the Commission. In reaching its conclusion, the Commission mentioned—but did not exclusively rely on—"acquiesence" by Texas in the original sale by Superior (App. D, pp. 28a-29a).

Public Service, Texas, and Louisiana filed for rehearing of the declaratory order, and in the second order under review here, the Commission denied rehearing. (App. C, *infra*). Public Service, Texas, and Louisiana then petitioned the U.S. Court of Appeals for the Fifth Circuit for review of the Commission's orders. The Fifth Circuit concluded that, although the arguments made against the assertion of jurisdiction over Texas appeared both "logical" and "consistent with the statutory language," the court was bound to uphold the Commission's decision because of its reading of this Court's recent decision in ***California*** v.

Southland Royalty Company, supra, 436 U.S. 519 (1978). The Fifth Circuit read this Court's *Southland* decision to mean that, without regard to the language of the Natural Gas Act itself, the requirements of § 7(b) apply to entities other than "natural gas companies" if they acquiesce in the sale of their gas in interstate commerce. The Fifth Circuit did not attempt to reconcile its holding with the language and purpose of the Natural Gas Act. Rather, the Fifth Circuit based its decision solely upon the belief that:

> As we see it, *Southland* establishes the principle that any party, whether a "natural gas company" or not, that acquiesces in the "dedication" of its gas to interstate commerce becomes obligated to continue the dedicated service or seek Commission approval to abandon it. 587 F.2d 716, 719 (App. B *infra,* p. 7a.)

Texas applied for rehearing of the Fifth Circuit's decision arguing, *inter alia,* that Texas did not "acquiesce" in the "dedication" of its gas. The Fifth Circuit denied rehearing on February 8, 1979 (App. A, *infra*).

REASONS FOR GRANTING THE WRIT

The Commission's unprecedented attempt to assert jurisdiction under the Natural Gas Act over a state presents an important issue affecting state and federal relations. It also presents issues concerning the scope and effect of the Natural Gas Act which will extend well beyond the facts of this case.

As both the Commission and the Fifth Circuit recognize, Congress, in explicit terms and with deliberate intention, excluded the activities of states from the reach of federal jurisdiction under the Natural Gas

Act. Yet the Fifth Circuit felt compelled to ignore specific statutory language, as well as the Congressional intent, because of dicta in this Court's *Southland* decision to the effect that—in the peculiar circumstances of that case—whether or not a private landowner had been a "natural gas company" was "somewhat beside the point," 436 U.S. 519, 528. This Court, however, could not have intended, by its dicta in *Southland*, to sweep away jurisdictional limitations which were deliberately imposed on the Commission by the Congress. Granting the writ in this case would permit the Court to correct the Fifth Circuit's erroneous interpretation of *Southland.*

The Fifth Circuit's reading of *Southland* to eliminate the statutory requirement that the Commission's jurisdiction extend only to natural gas companies would have additional far-reaching consequences. By permitting the Commission to ignore that limitation, the Fifth Circuit's decision would seriously undermine the regulatory structure both of the Natural Gas Act of 1938 and the recently enacted Natural Gas Policy Act of 1978 (NGPA), Pub. L. 95-621, 92 Stat. 3340. The NGPA relies on the Natural Gas Act's definition of "natural gas company" to limit the regulatory consequences of certain transactions entered into under the NGPA.

A. The Fifth Circuit's Decision Is Inconsistent With the Statutory Language and the Legislative History of the Natural Gas Act.

As this Court has said, the Congress intended the Commission to be a creature of strictly limited jurisdiction:

> . . . . The Natural Gas Act did not envisage federal regulation of the entire natural gas field to the

limit of constitutional power. Rather, it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies. *FPC* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 502-503 (1949).

The Congress limited the Commission's jurisdiction first by establishing that the substantive provisions of the Act would apply only to "natural gas companies" and then by carefully defining the term. Thus, § 7(b) applies only to natural gas companies:

> *No natural gas company* shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained. . . . 15 U.S.C. § 717f(b).

The term "natural gas company" is then carefully defined by the interplay of subsections (1), (2), (3), (4), (5), (6), and (7) of section 2 of the Act, 15 U.S.C. § 717a. Congress would not have taken such care to define the term "natural gas company" had the question of whether an entity is a natural gas company been always "beside the point."

As the Commission itself shows well in the orders under review, the term "natural gas company" was defined specifically to exclude state agencies. The Commission's analysis and conclusion was as follows:

> In Section 2(6), a "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale. Under Section 2(1), a "person" includes an individual or a corporation. Under Section 2(2), a corporation does not include "municipalities," a term under section 2(3) meaning "a city, county or other political subdivision or agency of a State." The agencies of states, such as the School Land Board of Texas, are thus in terms excluded from the jurisdiction of the Commission (App. D, p. 23a).

The Commission went on to show that other provisions of the Act "indicate that states are not intended to be natural gas companies," and that neither a state nor a state agency is a "natural gas company subject to the jurisdiction of the Commission." (App. D, p. 25a).

The Fifth Circuit concluded that the Commission was "correct" to find that both states and state agencies are excluded from the definition of "natural gas company." 587 F.2d 716, 718 n. 8 (App. B, p. 5a-6a).

Since the states are not "natural gas companies" subject to the jurisdiction of the Commission, they cannot be subject to the requirements of section 7(b), which applies by its own terms only to the activities of natural gas companies.

The Congress excluded the states from the definition of "natural gas company" in order to effectuate its intent to exclude the states from the substantive requirements of the Act. That intention was fully consistent with the general intention not to diminish the powers and prerogatives of the states. As the Commission itself said in the declaratory order under review:

> [T]he legislative history of the Natural Gas Act makes it clear that the purpose of the Act was to occupy the field in which the Supreme Court has

> held that the states may not act and it takes no authority from state commissions. In *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U.S. 507, 517-518 (1947), it was said, "The Act, though extending federal regulation, had no purpose or effect to cut down state power" (App. D, p. 25a).

This Court's own analyses of the legislative history of the Natural Gas Act have emphasized the care with which Congress approached the creation and limitation of the Commission's jurisdiction. State and federal authority were to complement each other, and the federal commission was not to encroach upon the powers of the states. Thus, in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U.S. 507 (1947), this Court said, in addition to the language quoted by the Commission, that "the Act was drawn with meticulous regard for the continued exercise of state power, *not to handicap or dilute it in any way.*" 332 U.S. at 517-518 (emphasis supplied).

And, in *FPC* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498 (1949), this Court said:

> The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other. . . . [Congress] considered the state interests as well as the national interest. 337 U.S. 498, 518.

In finding that it may exercise jurisdiction over the states "where the context so requires," the Commission thus ignored both the legislative intent and the plain statutory language. As will be shown below, the judicial decisions cited by the Commission and the Fifth

Circuit do not support the Commission's attempt to ignore its jurisdictional limits.

B. The Cases Cited in the Commission's Order Do Not Support the Exercise of Jurisdiction Over the State of Texas.

In order to hold that Texas is subject to the requirements of section 7(b), the Commission developed a simplistic theory of "dedication" of gas. It found that Superior had "dedicated" Texas' gas to interstate commerce, and it asserted that "once dedicated, the reserves remain dedicated"—without regard to the jurisdictional or nonjurisdictional status of the owner of the gas (App. D, p. 28a). For that conclusion the Commission cited two cases, neither of which supports the proposition: *Atlantic Refining Co.* v. *New York Public Service Commission* (CATCO), 360 U.S. 378 (1959), and *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960). In both *CATCO* and *Sunray*, the producers were required to continue deliveries of gas —after the expiration of their gas sales contracts— unless abandonment authorization was first obtained from the Commission under section 7(b). However, in both cases the producers were "natural gas companies" within the meaning of section 7(b), and they were therefore subject to the Commission's jurisdiction and to the requirements of the Act. Neither case provides any support for the Commission's attempt to exercise jurisdiction over an entity which cannot, by definition, be a "natural gas company."

C. This Court's *Southland* Decision Does Not Confer Jurisdiction Upon the Commission Where Jurisdiction Is Denied by the Act.

The Fifth Circuit's affirmance of the Commission's orders was based solely upon its reading of the deci-

sion of this Court in *California* v. *Southland Royalty Company*, 436 U.S. 519 (1978):

> *As logical and as consistent with the statutory language as petitioners' argument might appear, we must nevertheless conclude that their position cannot be upheld.* Our reading of the recent Supreme Court decision in *California* v. *Southland Royalty Company*, 1978, 436 U.S. 519, 98 S.Ct. 1955, 56 L.Ed.2d 505, leads us to conclude that an entity's status as a "natural gas company" is largely irrelevant to the question of whether that entity must seek abandonment authorization under § 7(b). As we see it, *Southland* establishes the principle that any party, whether a "natural gas company" or not, that acquiesces in the "dedication" of its gas to interstate commerce becomes obligated to continue the dedicated service or seek Commission approval to abandon it. 587 F.2d 716, 719 (App. B, p. 7a).

Southland, however, cannot control the result in this case because it dealt with the obligations under the Natural Gas Act of a private entity. *Southland* did not deal with the obligations under the Act of an entity, like a state agency, which the statute specifically excludes from the Commission's jurisdiction. The Fifth Circuit, while recognizing that distinction, relied primarily on dicta in *Southland* to the effect that whether the lessor in that case had been a natural gas company was "somewhat beside the point" (436 U.S. at 528) in the peculiar circumstances of that case. The *Southland* dicta, however, cannot be read so broadly as to eliminate from the Natural Gas Act the limitations on the Commission's jurisdiction which the Congress purposefully placed there.

In *Southland,* the producer, Gulf Oil Company, was producing gas under a fifty year lease. This Court held

that, at the end of the term of the lease, the owners of the reversionary interest (the lessors) were required to comply with the requirements of § 7(b) before the sale could be halted. Thus, the lessors were obligated to continue the sale which Gulf had begun unless and until the Commission authorized abandonment of the sale. The Court reasoned that:

> [T]he obligation to continue service attached to the gas, not as a matter of contract but as a matter of law, and bound all with dominion and power of sale over the gas, including the lessor to whom it reverted. 536 U.S. at 526.

Because a service obligation "attached to the gas," the owners of the reversionary interest "became obligated to continue the service when they assumed control of the gas." 536 U.S. at 528.

In *Southland*, thus, the lessors (private royalty owners) succeeded to Gulf's service obligations. But when they did so, they, in their turn, became "natural gas companies"[3] and, as "natural gas companies," they could be required to comply with the terms of § 7(b). There was nothing in the Natural Gas Act which would preclude the Commission from exercising jurisdiction over them as "natural gas companies." It was only in that context that the question of whether the lessors had been "natural gas companies" before they assumed the service obligation was "somewhat beside the point."

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[3] A "natural gas company" is defined by section 2(6) of the Act as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6). The lessors in Southland were "persons" within the meaning of the Act.

In this case, however, the party which will assume control of the gas is the state of Texas. Texas is not a natural gas company and, unlike the lessors in *Southland*, cannot become a natural gas company when it assumes control of the gas. The distinction is of critical importance. *Southland* does not mean that an entity, like a state agency, which is, in specific terms, excluded from the definition of a natural gas company, can be bound by a requirement which is applicable only to activities of "natural gas companies."

The claim that Texas "acquiesced"[4] in the initial interstate movement of its gas does not change Texas' jurisdictional status under the Natural Gas Act. No action taken by Texas could confer jurisdiction upon the Commission where the Act expressly forbids it. "The FPC is limited by the provision establishing its jurisdiction." *Mobil Oil Corp.* v. *FPC,* 463 F.2d 256, 263 (1972), *cert. denied,* 406 U.S. 976 (1972).

D. The Fifth Circuit's Decision, if Upheld, Would Undermine the Regulatory Scheme Established by Congress in the Natural Gas Act and Would Also Undermine Important Provisions of the Natural Gas Policy Act of 1978.

The Fifth Circuit's reading of *Southland* to eliminate the limitations on the Commission's jurisdiction imposed by the definition of "natural gas company" would have consequences which would extend well beyond the facts of this case. The Fifth Circuit's reading seriously undermines the regulatory structures both of the Natural Gas Act of 1938 and the recently enacted

[4] That claim was disputed by Texas in its application for rehearing filed in the Court of Appeals.

Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3340. As shown above, the Congress intended the Commission to be a creature of limited jurisdiction. It limited that jurisdiction first by specifying that only natural gas companies would be regulated and then by carefully defining the term "natural gas company."

In the Natural Gas Policy Act, Congress has also written important statutory provisions in reliance upon the fact that, under the Natural Gas Act, only "natural gas companies," are subject to Commission regulation. In § 311 of the Natural Gas Policy Act, Congress has authorized nonjurisdictional intrastate companies to participate in certain transactions to assist interstate pipelines in obtaining and transporting gas. In § 601 of the NGPA, the Congress has sought to guarantee to those intrastate companies that their participation in § 311 transactions will not cause them to be subject to federal regulation under the Natural Gas Act. The device used to provide that assurance is simply to declare that participation in such transactions will not cause the entities to be deemed "natural gas companies" under the Natural Gas Act. Section 601(a)(2)(B) of the NGPA, for example, reads as follows:

> For purposes of the Natural Gas Act, the term "natural gas company" (as defined in § 2(6) of such Act) shall not include any person by reason of, or with respect to, any transportation of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of [other provisions of the NGPA, including § 311].

Similar language is found in Section 601(a)(1)(D) of the NGPA, relating to sales of natural gas by intrastate pipelines to interstate pipelines.

If the Fifth Circuit is correct that an entity's definitional status as a "natural gas company" is "largely irrelevant" to whether the Natural Gas Act applies to its activities, then the protections and encouragements which Congress sought to provide in the Natural Gas Policy Act will be frustrated.

CONCLUSION

The argument that § 7(b) of the Natural Gas Act does not apply to the states is, as the Fifth Circuit acknowledged, both "logical" and "consistent with the statutory language." It is, in fact, the only reading of the statute which will give effect to the Congressional intention "not to cut down state power," *Panhandle Eastern Pipe Line Company* v. *Public Service Commission, supra,* 332 U.S. 507, 517-18, as well as to the plain meaning of the statute. This Court's opinion in *Southland* did not confer on the Commission jurisdiction over the states which the statute expressly forbids. It is therefore respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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April 16, 1979

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 77-2728, 77-2746 & 77-2807

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, *Petitioner*,

versus

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*,

STATE OF TEXAS, *Petitioner*,

versus

F.E.R.C., *Respondent*,

STATE OF LOUISIANA, *Petitioner*,

versus

F.E.R.C., *Respondent*.

On Petitioners for Review of Orders of the Federal Power Commission.

On Petition for Rehearing

(February 8, 1979)

Before BROWN, *Chief Judge*, GODBOLD * and RONEY, *Circuit Judges*.

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* Judge Godbold did not participate in the final decision. Pursuant to 28 U.S.C.A. 46(d), the decision is rendered by a quorum.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ JOHN R. BROWN
John R. Brown
Chief Judge

APPENDIX B

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., State of Texas, State of Louisiana, Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent,

State of Alaska, State of New Mexico Energy Resources Board, Public Service Commission of the State of New York, Natural Gas Pipeline Company of America, Intervenors.

Nos. 77-2728, 77-2746 and 77-2807.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Jan. 11, 1979.

On Petitions for Review of Orders of the Federal Power Commission.

Before BROWN, *Chief Judge*, GODBOLD * and RONEY, *Circuit Judges*.

JOHN R. BROWN, *Chief Judge:*

This case presents the question whether a state, which is not a "natural gas company" under the Natural Gas Act (the Act), may nevertheless be made subject to the abandonment provisions of § 7(b) of the Act.[1] We conclude

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* Judge Godbold did not participate in the final decision. Pursuant to 28 U.S.C.A. § 46(d), the decision is rendered by a quorum.

[1] Section 7(b) of the Natural Gas Act, 15 U.S.C.A. § 717f(b), provides as follows:

> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first

that where the state has consented to the interstate dedication of its gas, the state must obtain FERC approval prior to abandoning the certificated service.

I.

Much of Texas's public education system is financed from revenues received through the issuance of state oil and gas leases to producers, who then remit a royalty to the state.[2] In the case before us, in May, 1970, Texas, acting through its agency the School Land Board of Texas,[3] followed this scheme by issuing to Superior Oil Company (Superior) gas leases covering state-owned land.[4] In turn, Texas retained a royalty interest that could be taken either "for value" or "in kind.[5]" Pursuant to a 1971 Federal Power Commission certificate obtained by Superior,[6] all

had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

[2] See Vernon's Tex.Civ.Stat. art. 5421c.

[3] We will use the term "Texas" to encompass both the state and its agency, the School Land Board, there being no significant legal distinction between the two entities.

[4] Three leases were eventually issued by Texas to Superior. Only the first two of these leases are involved in this case.

[5] The original leases between Superior and Texas did not provide for Texas's taking the gas in kind. In January, 1974, however, the parties amended their agreements so as to recognize Texas's right to take its royalty in kind.

[6] In the course of this litigation, the Federal Power Commission became the Federal Energy Regulatory Commission. Department of Energy Organization Act, Pub.L. 95-91, 91 Stat. 565 (August 4, 1977); Executive Order No. 12009, 42 Fed.Reg. 46267 (September 13, 1977). The new nomenclature makes no difference to the outcome of this case. So, to avoid any confusion we will herein-

the gas produced by Superior, both its own and that attributable to Texas's royalty share, was then sold in interstate commerce to Natural Gas Pipeline Company (Natural).

For several years, Texas received its royalty share in money. Then, on April 25, 1975, after the leases had been amended so as to permit the taking of royalties in kind,[7] Texas elected to take in kind. Shortly thereafter, Texas entered into an agreement to sell its royalty share to Public Service Company of North Carolina (Public Service), a natural gas distribution company. Upon learning of this contemplated transaction, the Commission informed the parties that Texas's royalty gas could not be diverted from Natural to Public Service without prior abandonment authorization from the agency.

Public Service then petitioned the Commission for an order declaring that the Commission had no jurisdiction to require abandonment authorization prior to Texas's taking its royalty gas in kind. In its Declaratory Order, the Commission concluded that, although neither Texas nor its agency was a "natural gas company" within the meaning of the Act,[8] both Texas *and* Superior were re-

after refer to the federal energy agency merely as "the Commission," a term that encompasses either the FPC or FERC, as applicable.

The certificate referred to in the text is, of course, the "certificate of public convenience and necessity" required under § 7(c) of the Act. 15 U.S.C.A. § 717f(c).

[7] See note 5, *supra*.

[8] The Commission observed that although the definitions of § 2 of the Natural Gas Act did not specifically exclude a state as a "natural gas company," they did exclude state agencies. See 15 U.S.C.A. § 717a(1)-(3), (6). Since state agencies were expressly excluded from the definition of a "natural gas company," and since there was no legal distinction between a state and the agency

quired to seek abandonment authorization—Superior, because it had dedicated the gas reserves to interstate commerce, and Texas, because it had acquiesced in this dedication:

> [T]he reserves covered by . . . the first two leases were dedicated to interstate commerce when Superior made the sale to Natural. A certificate was issued . . . and gas was delivered. Texas did not object to this course of business until . . . it notified the Commission of its intention to take the royalty gas in kind. Once dedicated, the reserves remained dedicated and this is the result distinct from the underlying contractual arrangement.
>
> * * * * * *
>
> Under the facts here, particularly the acquiescence of Texas in the interstate course of business we conclude therefore that, before Texas' royalty gas from the first two leases can be withdrawn from sale to Natural and transported and delivered to Public Service, Texas, or its agency, and Superior must obtain abandonment authority under Section 7(b) of the Natural Gas Act.[9]

Public Service unsuccessfully challenged the Commission's Order in administrative proceedings and now brings its Petition for Review in this Court.[10]

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through which it acts, the Commission reasoned that the state, as well as its agent, was excluded from the definition of a "natural gas company." Public Service Company of North Carolina, Inc., Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandonment Authorization, Docket No. RP76-103 (April 26, 1977) [hereinafter cited as Declaratory Order], at 4-5. We conclude that in this respect the Commission was correct.

[9] Declaratory Order, note 8, *supra*, at 8, 10.

[10] Also before this Court as petitioners are the states of Texas and Louisiana. In addition, the state of Alaska, the New Mexico Energy Resources Board, the Public Service Commission of New York, and Natural have joined the proceedings as intervenors.

II.

Petitioners' main contention is that since a state is not, and never can be, a "natural gas company" under the Act, the Commission cannot require the state to seek abandonment authorization under §7(b) of the Act, a section that is specifically limited to "natural gas companies." Moreover, petitioners argue, since a state cannot directly come within the ambit of § 7(b), the same result cannot be achieved indirectly by requiring Superior to seek abandonment authorization.[11]

As logical and as consistent with the statutory language as petitioners' argument might appear, we must nevertheless conclude that their position cannot be upheld. Our reading of the recent Supreme Court decision in *California v. Southland Royalty Company*, 1978, 436 U.S. 519, 98 S.Ct. 1955, 56 L.Ed.2d 505, leads us to conclude that an entity's status as a "natural gas company" is largely irrelevant to the question of whether that entity must seek abandonment authorization under § 7(b). As we see it, *Southland* establishes the principle that any party, whether a "natural gas company" or not, that acquiesces in the "dedication" of its gas to interstate commerce becomes obligated to continue the dedicated service or seek Commission approval to abandon it.

In *Southland*, Gulf acquired a 50-year leasehold interest in certain oil and gas reserves, with Southland and others retaining a reversionary interest in those reserves. As authorized by the terms of its lease, Gulf arranged to sell the production in interstate commerce. Accordingly, Gulf

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[11] Since we find that the Commission can directly require Texas to seek abandonment, we need not consider Texas's argument that such could not be done indirectly through Superior.

obtained a Commission certificate of unlimited duration and proceeded to transmit gas through the interstate market. Later, upon expiration of its lease, Gulf's interest in the reserves went to Southland and the other owners of the reversionary interest. These owners then sought to make an intrastate sale of the remaining gas reserves. Despite the fact that Gulf, a tenant for a term of years, had under Texas law no legal rights over the gas remaining after the termination of the lease, the Court determined that the lessee Gulf had, with the owners' approval, "dedicated" all the reserves to interstate commerce by transporting the gas in the interstate market subject to a certificate of unlimited duration:

> This issuance of a certificate of unlimited duration covering the gas at issue here created a federal obligation to serve the interstate market until abandonment had been obtained. The Commission reasonably concluded that under the statute the obligation to continue service attached to the gas, not as a matter of contract but as a matter of law, and bound all those with dominion and power of sale over the gas, including the lessor to whom it reverted.
>
> [T]he service obligation imposed by the Commission survived the expiration of the private agreement which gave rise to the Commission's jurisdiction.

Id. at 1959, 98 S.Ct. at 1959. Once this gas was so dedicated, the Court held, the owners could not divert it from interstate commerce without first seeking Commission authorization under § 7(b) of the Act.

The facts of the case before us are clearly analogous to those of *Southland*. Texas fully acquiesced in Superior's interstate transmission of *all* the production to Natural. Texas never objected to Superior's obtaining a certificate covering *all* the gas, and indeed, Texas profited from Superior's interstate dedication of the gas by accepting royal-

ty payments based on the interstate sales of its gas. Thus, to paraphrase the Court in *Southland*, Texas, having consented to Superior's interstate sales of gas, cannot now object to the rules and restrictions that accompany such sales. *Cf. id.* at 1960-61, 98 S.Ct. 1955.

Petitioners seek to distinguish the instant case from *Southland* on the grounds that the owners of the reversionary interest in *Southland* could become "natural gas companies," while Texas can never achieve this status. This may well be true. The argument, however, overlooks the major point of *Southland*—that it is the *dedication* of the gas that creates the service obligation. Indeed, in *Southland*, the Court refused to reach the question of whether the owners were "natural gas companies." Instead, the Court pointed out that whether or not the owners were "natural gas companies" was "[largely] beside the point, for the obligation to serve the interstate market had already attached to the *gas*, and respondents became obligated to continue that service when they assumed control of the gas." *Id.* at 528, 98 S.Ct. at 1960. Thus, the fact that Texas can never become a "natural gas company" is irrelevant once Texas has allowed its gas to be dedicated to interstate service.[12]

Petitioners also seek exemption from the abandonment requirement on the grounds that Superior did not have the legal authority to dedicate Texas's royalty gas, gas that Superior did not own. This argument was, however, handily disposed of in *Southland*, where the owners challenged Gulf's legal authority to dedicate their gas. Admitting the "appealing resonance" of the maxim that "'no man can dedicate what he does not own,'" the Court con-

[12] Because it is the *fact* of dedication that is decisive, it is also irrelevant whether Texas could or could not take its royalty in kind from the inception of the contract with Superior. The existence of an *unexercised* right to take in kind has no consequence.

cluded that indeed he could. *Id.* at 528, 98 S.Ct. at 1960. Dedication is not a matter of a lessee's giving away or selling gas that it does not own, the Court explained, but rather a matter of changing the regulatory status of that gas. Superior's consented-to acquisition of the interstate certificate is effective to dedicate Texas's gas whatever the parties' relationship might be under local law.

We emphasize, however, that in our holding today we are deciding only the fate of royalty-owning states that seek to abandon interstate service after having consented to interstate transmission of gas pursuant to a Commission certificate issued to a natural gas company. Although the Commission stated in its Order that a state agency or state might be subject to the Natural Gas Act "where the context so requires," we expressly limit our holding to cover only the facts before us today. We do not decide what consequences would flow from the transmission of a state's gas without Commission authorization or without the state's acquiescence. Nor do we decide what results would obtain where the state itself initially sells directly in interstate commerce.[13] Instead, we repeat that it is the convergence of three factors—(1) interstate transmission by a natural gas company, (2) Commission certification, and (3) the state's acquiescence in (1) and (2) that gives rise to a continued service obligation.

III.

Although we find that most of the contentions raised by petitioners have been answered in *Southland*, there is one element of this case that distinguishes it from the prior

[13] We observe that at oral argument, the attorney for the Commission conceded that Texas could directly sell its gas in interstate commerce without the necessity of a certificate and could later terminate its direct sales without the necessity of seeking abandonment authorization.

decision. That distinction stems from Texas's special status as a sovereign state of the Union.

Petitioners contend that the Commission's attempt to regulate state-owned gas amounts to an unconstitutional intrusion on state sovereignty.[14] As support for this proposition, petitioners cite the Supreme Court decision in *National League of Cities v. Usery*, 1976, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245. There, the Court ruled that Congress could not constitutionally extend provisions of the Fair Labor Standards Act to cover state and local employees: "[I]nsofar as the challenged [provisions] operate to *directly displace* the States' freedom to structure *integral operations* in *areas of traditional governmental functions*, they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.* at 852, 96 S.Ct. at 2474 (emphasis added).

In this case, however, Texas's activities do not come under the protective mantle of *National League of Cities*. Texas's oil and gas business is not a "traditional governmental function" of the sort described by the Court in

[14] Before the Commission, intervenor New Mexico also contended that the Commission's action violated the "equal footing doctrine," in light of § 13(b) of the Alaska Natural Gas Transportation Act of 1976, 15 U.S.C.A. § 719k(b), which requires the Commission to approve Alaska's withdrawals of dedicated gas for use within Alaska. The argument was that the Commission's action unconstitutionally subjected Texas to disparate treatment from that afforded Alaska. See Declaratory Order, note 8, *supra*, at 7, 10. This argument was not raised on appeal, and we do not consider it today.

Although the constitutional argument was abandoned on appeal, Texas did rely on § 719k(b) as an indication of congressional policy favoring the right of all states "to dispose freely" of their royalty gas. Brief for Petitioner the State of Texas, at 15. From our reading of the Alaska Natural Gas Transportation Act and its legislative history, we do not find sufficient support for this interpretation that goes beyond the clear language of the statute.

National League of Cities.[15] Instead, the business engaged in by Texas is an operation indistinguishable from like commercial activities of private business. It is precisely this sort of state activity that may be subject to federal regulation. *See id.* at 854 n. 18, 96 S.Ct. 2465.[16]

Moreover, it cannot be said that federal regulation here will "directly displace" a traditional governmental function. Commission regulation may well affect the amount of revenues received into the school fund. This indirect effect, however, comes nowhere near constituting a federal usurpation of state control over public education in Texas.

Finally, we find helpful the balancing approach suggested by Justice Blackmun, who provided the "swing vote" in *National League of Cities*, 426 U.S. at 856, 96 S.Ct. 2465 (Blackmun, J., concurring). In applying that test here, we have determined that the important federal interest in securing a continuous supply of natural gas in interstate markets outweighs the incidental effect that Commission regulation might have on the school children of Texas.

[15] As examples of traditional functions of state and local governments, the Court cited police and fire protection, sanitation, public health, and parks and recreation. 426 U.S. at 851, 96 S.Ct. 2465.

[16] The Court sanctioned this principle by approving its prior holding in *United States v. California*, 1936, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567. In that case, the Court determined that a state-owned railroad operating in interstate commerce was subject to the federal Safety Appliance Act: "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers . . . ." *Id.* at 185, 56 S.Ct. at 424. *See also Parden v. Terminal Railway of the Alabama State Docks Department*, 1964, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (state's operation of railroad in interstate commerce constitutes waiver of sovereign immunity in suit brought under the Federal Employers' Liability Act).

Accordingly, because we find that Texas permitted the interstate dedication of its gas, and because the state activity in question here is properly subject to federal regulation, we hold that the Commission correctly concluded that Texas must seek abandonment authorization prior to withdrawing its gas from service to Natural.

ENFORCED.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and John H. Holloman III.

Docket No. RP76-103

Public Service Company of North Carolina, Inc.

Order Denying Rehearing

(Issued July 6, 1977)

The Public Service Company of North Carolina, Inc. (Public Service), the State of Texas and the State of Louisiana on May 26, 1977, have filed applications for rehearing with respect to the Commission's order of April 26, 1977, in the present docket. As related in that order Public Service petitioned the Commission for a declaratory order determining that it has no authority under the Natural Gas Act to require that abandonment authorization be obtained for royalty gas owned by Texas which is being sold to Natural Gas Pipe Line Company of America (Natural) by Superior Oil Company, but which Texas wishes to sell to Public Service.

The Commission determined that neither a state or its agency is a natural gas company and subject, as such, to the jurisdiction of the Commission. However, the Commission held that the gas reserves representing the royalty of Texas, or an agency, under lease to Superior by Lease Nos. M-58093 and M-58094 in the High Island Field in the Gulf of Mexico have been dedicated to interstate commerce by the sale of gas to Natural, and before it is withdrawn from such sale Texas, or its agency, and Superior must obtain abandonment authorization under Section 7(b) of the Act.

The Commission asked for information with respect to deliveries to Natural with respect to a third lease, No. M-69629. By letter filed May 6, 1977, Superior stated that the drilling on the lease resulted in a dry hole and that Texas has never taken its royalty gas in kind from this lease. We therefore exclude Lease No. M-69629 from any of the determinations made in this proceeding.

The applicants for rehearing all object to our determination that Superior and Texas, or its agency, must obtain abandonment authorization before selling to Public Service the royalty gas from the first two leases. Public service notes that the gas purchase contract between Superior and Natural dated May 7, 1971, (Superior's FPC Gas Rate Schedule No. 150) provides on page 6 that the seller reserves gas "to fulfill obligations to Seller's Lessors under the terms of such leases" and this means that the gas has not been dedicated to Natural but is subject to Seller's obligations to deliver to Texas royalty volumes in kind upon the exercise by the State of its statutory option to take such gas. As explained in our order of April 26, 1977, the original leases did not grant Texas the privilege of taking its gas in kind nor did the statute (Article 5421C, Section 8 of Vernon's Texas Civil Statutes) so provide. Therefore Texas did not reserve a right to use royalty gas elsewhere until entering into the new pooling agreement of January 10, 1974. In any case, Texas had acquiesced in the sale of gas from the two leases in interstate commerce and the entire leasehold interest had been dedicated to interstate commerce. *Phillips Petroleum Co.* v. *F.P.C.*, —— F.2d —— (CA10 May 17, 1977).

Since the filings of the applications for rehearing the court's opinion in *Pennzoil Producing Company* v. *F.P.C.*, —— F.2d —— (CA5 June 6, 1977), No. 76-1626 et al., has been issued. There gas was sold by Pennzoil and Shell to United Gas Pipe Line Company from leases in Terrebonne Parish, Louisiana. The leases provided for a royalty of a fraction of the value of the gas produced calculated at the

market rate prevailing at the well. Some years after the execution of the leases the lease holder, Williams, demanded payment of royalties at a much higher rate based on market values. Under a settlement Pennzoil and Shell agreed to ask the Commission for special relief on the interstate price or authority to abandon the sale of the royalty gas. The Commission denied both alternatives. On the abandonment question the court said that in denying abandonment the Commission was under the impression that Williams' gas was trapped in the interstate market, whether or not the leases were terminated and it might well be that the present or future public convenience or necessity will suggest the propriety of abandoning the royalty fraction of the gas rather than losing the whole amount from the interstate market.

In our opinion there is a distinction between *Pennzoil* and the present case. There the leaseholder was exercising his rights to a higher royalty existing in the leases before the sale of the gas in interstate commerce. Here there was no question of failing to pay the agreed upon royalty and the leaseholder, Texas, did not acquire its right to take the royalty gas in kind until after the dedication to interstate commerce. Furthermore, unlike *Pennzoil*, no abandonment was sought here but merely a declaratory order that we had no jurisdiction to require abandonment authorization.

In other respects the contentions made on rehearing are, in general, similar to those originally made and further discussion is not necessary.

The Commission further finds:

The assignments of error and grounds for rehearing of the Commission's order of April 26, 1977, in the applications for rehearing filed by Public Service, Texas and Louisiana present no facts or legal principals that would warrant any change in or modification of the Commission's order as supplemented herein.

The Commission orders:

The applications for rehearing filed by Public Service, Texas and Louisiana are denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: RICHARD L. DUNHAM, Chairman; DON S. SMITH, JOHN H. HOLLOMAN III, and JAMES G. WATT.

Docket No. RP76-103

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandoning Authorization, and Denying Oral Argument

(Issued April 26, 1977)

Public Service Company of North Carolina, Inc. (Public Service) on May 24, 1976, petitioned the Commission for a declaratory order determining that it has no authority under the Natural Gas Act to require that abandonment authorization be obtained for royalty gas owned by the State of Texas which is being sold to Natural Gas Pipe Line Company of America (Natural), by Superior Oil Company (Superior) under its Rate Schedule No. 150 currently at a price of 32.117 cents per Mcf, but which Texas wishes to sell to Public Service employing the pipeline of Transcontinental Gas Pipe Line Corporation (Transco) to transport the gas.

The gas reserves involved are in the High Island Field, offshore in the State of Texas and are presently under lease to the Superior Oil Company. Originally there were two leases,[1] but on January 10, 1974, the Commissioner of the General Land Office on behalf of Texas with Superior

[1] Texas Lease Nos. M-58093 and M-58094.

and Natural entered into a new pooling agreement to add an additional lease [2] and to provide, among other things, that Texas may at its option upon not less than 60 days written notice require that payment of all royalties be made in kind. Upon application by Superior, the Commission on February 11, 1975, issued an order amending its certificate with an ordering clause covering a number of certificates stating that the certificate "does not imply approval of all of the terms of the contracts, particularly as to the cessation of the service upon termination of said contracts as provided by Section 7(b) of the Natural Gas Act." [3]

On April 25, 1975, Texas notified the Commission of its intention to take the royalty gas in kind, but the Secretary by direction of the Commission, on June 13, 1975, informed Texas that the February 11, 1975, order did not authorize Superior to divert dedicated gas from the interstate market without abandonment authorization. On May 1, 1975, Texas acting by and through the School Land Board of Texas, an agency of the State, entered into an agreement with Public Service for the sale of the royalty gas. The price would be $1.44 per Mcf and the quantity would be 1,100,000 Mcf per year. The gas would be transported by Transco, which is now supplying Public Service, but Transco will not agree to transport the gas until the Commission rules that abandonment need not be sought. In its petition filed May 24, 1976, Public Service recited the background facts and argued that the Commission should issue a declaratory order determining that it has no jurisdiction to require that abandonment authority be sought prior to the sale and delivery of Texas' royalty gas to Public Service.

[2] Texas Lease No. M-69629.

[3] *Skelly Oil Company, et al.*, Docket No. G-5354 et al., issued February 11, 1975, including *The Superior Oil Company*, Docket No. CI71-870.

On October 5, 1976, the Commission issued an order asking that briefs be submitted to the Commission on the following issues:

(1) Within the meaning of Section 2 of the Natural Gas Act, is there any legally applicable difference between a State of the United States and an agency of a State?

(2) Is a State of the United States subject to the jurisdiction of the Commission under the Natural Gas Act?

(3) If a State is a jurisdictional entity, does that automatically make any agency of the State jurisdictional, or if it is a separate question then whether the agency is jurisdiction?

(4) If a State is not jurisdictional, can an agency of the State be jurisdictional?

(5) If the Commission has no jurisdiction over a state or an agency of the state, can the Commission then require the present producer of the states' or state agency's royalty share to obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act prior to the state or its agency selling the subject gas in interstate commerce?

On the first four questions the Office of General Counsel (OGC) in the Commission's staff brief, Public Service, the State of Alaska, the State of Louisiana, the Public Service Commission of the State of New York, the State of Texas and the State of New Mexico argue variously (1) that there is no legally applicable difference between a state and its agency, (2) that a state is not subject to the jurisdiction of the Commission, (3) that even if a state is jurisdictional, and they say it is not, its agency would not be jurisdictional, and (4) that if a state is not jurisdictional, its agency, in any case, would not be jurisdictional. The arguments of Public Service, OGC and the intervening states are based on the Natural Gas Act, certain cases and the Constitution and will be discussed below.

On the other hand, in the staff brief the Bureau of Natural Gas (BNG) argues that Congress meant to create a comprehensive and effective regulatory scheme without leaving gaps contrary to the public welfare, citing *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U.S. 507 (1947) and *F.P.C.* v. *Louisiana Power and Light Co.*, 406 U.S. 621 (1971). BNG says that to conclude that Section 2 controls jurisdiction because it excludes a state agency from the definition of a "person" and therefore from the term "natural-gas company" is an unreasonable, unrealistic construction of the Natural Gas Act, and subverts the purpose of the statute. It observes that Section 2 initially provides that "When used in this Act, unless the context otherwise requires—", before setting forth the definitions.

BNG notes that volumes of natural gas now flowing in interstate commerce which represent the royalty component contractually accruing to states or agencies of states are very large. It says that a conclusion that volumes currently flowing in interstate commerce unequivocably are subject to Section 7(b), and thus cannot be removed from interstate commerce without affirmative approval by the Commission, may be misleading. Thus, if Section 2 can be interpreted as controlling the jurisdictional provisions in Section 1, it should also control Section 7, including Section 7(b) relating to abandonment. BNG argues that the potential impact of conceding a loophole in the act relating to state or other agencies does not stop here. Prospectively states could build pipelines across state lines or across the international border without approval of the Commission. Further, states or their agencies could build pipelines, acquire royalty interests, accomplish transportation or sales in interstate commerce, and engage in acts which are within the purpose of the Natural Gas Act and which existing Commission policy prohibits in regard to natural gas companies.

The American Public Gas Association (APGA) believes that under Section 2 of the Act both a state and its agencies are exempted from regulation but through their acts may voluntarily accept Commission regulation over particular transportation activities and sales for resale in interstate commerce. It refers to Section 1(b) giving the Commission jurisdiction over (1) transportation of gas in interstate commerce, (2) sales for resale in interstate commerce and (3) natural-gas companies. Thus, it says, any sale of gas for resale or transportation of gas involved in a direct sale in interstate commerce made by Texas is subject to FPC jurisdiction even though the state itself is exempt from the Act. Furthermore, the sale of Texas' royalty gas in interstate commerce by Superior to Natural for resale is subject to FPC jurisdiction because Texas has consented to such jurisdiction through the grant of a certificate to Superior and the subsequent amendment which encompassed all of the gas from the dedicated acreage owned by Texas including its royalty interest.

The definitions in Section 2 of the Natural Gas Act do not specifically exclude a state as a "natural-gas company", but do exclude state agencies. In section 2(6) a "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale". Under Section 2(1) a " 'person' includes an individual or a corporation". Under Section 2(2) a "Corporation" does not include "municipalities", a term under Section 2(3) meaning "a city, county, or other political subdivision or agency of a State". The agencies of states, such as the School Land Board of Texas, are thus in terms excluded from the jurisdiction of the Commission.

In *F.P.C.* v. *Corporation Commission of Oklahoma*, 362 F.Supp. 522, 544 (W.D. Okla.—1973); affirmed without opinion but with dissent 415 U.S. 961 (1974), a state agency was treated as a person. There the District Court upheld the right of the Commission to bring suit against a state

commission which had attempted to set minimum prices for gas entering interstate commerce. Section 20(a) of the Act permits suits against a "person" and the Court said that the state commission could be considered a "person" because Section 2(1) says that "person" "includes" an individual or corporation and the word "includes" is not a word of limitation but a word of enlargement. Therefore a state commission could be a non-individual person where, as here, the legislative environment so indicated. The purpose of the court here was to afford the FPC the procedural opportunity to protect its jurisdiction over interstate gas rates. This does not mean that a state agency is to be considered a "person" and a "natural-gas" company otherwise under the provisions of the Natural Gas Act although it may be subject to the Act where the context so requires.

Similarly, under the Federal Power Act the Court treated a county as a person in spite of the literal meaning of the definitions. *United States* v. *Public Utilities Commission*, 345 U.S. 295 (1953). There the question arose whether the Commission had jurisdiction over a sale to Mineral County for resale where a jurisdictional sale at wholesale was defined in Section 201(d) as "a sale of electric energy to any *person* for resale". Other definitions in Section 3 excluded the County as a "person", but the Court held that Congress did not intend to exclude such a sale from Commission regulation. While Section 3 did not have any saving language relating to context as does the Natural Gas Act the Court found, in effect, that, in the context of the definition of a sale at wholesale, "person" included a county.

A state, while not in terms excluded by Section 2, is not included in the definition of a "person" and hence of a "natural gas company". A state is not an individual and is not included in the definition of "corporation". Furthermore, the provisions of the Act indicate that states are not intended to be natural-gas companies. Thus Section 19(a)

lists "any person, state, municipality or state commission" specifically and separately. Also, the legislative history of the Natural Gas Act makes it clear that the purpose of the Act was to occupy the field in which the Supreme Court has held that the states may not act and it takes no authority from state commissions.[4] In *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U.S. 507, 517-518 (1947) it was said, "The Act, though extending federal regulation, had no purpose or effect to cut down state power". The language of Section 1, cited by BNG, provides for Commission authority over the transportation and sale of natural gas in interstate commerce and over natural-gas companies, but that section does not define natural-gas companies. That definition is left to Section 2, and there is nothing in the context of Section 1 that would indicate that states or their agencies are considered to be natural-gas companies.

We conclude that neither a state agency or a state is a natural-gas company subject to the jurisdiction of the Commission although they may be subject to the Act where the context so requires, and it follows that there is no legally applicable difference between them. To make any difference between them would be unrealistic, for a state usually acts through an agency; and in any case, if an agency was excluded from jurisdiction while a state was not, the state would arrange that any royalty gas sales be made through the state agency.

We agree with BNG that FPC regulation was to be broadly complementary to that reserved to the states, that regulation and matters relating to the transportation and sale of natural gas in interstate commerce is necessary in the public interest, that the Act must be read in its entirety and there may be untoward consequences in the states' selling their royalty gas on a large scale in interstate commerce.

[4] H. Rep. 709, 75th Cong., 1st Sess., p. 2.

But the intention of Congress was to leave state jurisdiction intact, and to regulate interstate commerce in that context. Accordingly, we conclude that for the purpose of this proceeding questions (1) and (2) should be answered in the negative. On question (3), even if a state were jurisdictional, a state agency would not be jurisdictional by the plain meaning of Section 2. On question (4) if a state is not jurisdictional, the agency could not be jurisdictional and, in addition, is excluded specifically by Section 2.

Question (5) as to whether the Commission can require the present producer of the state's or state agency's royalty share to obtain Section 7(b) abandonment is a more complicated question. To this we must add a preliminary question whether even though Texas, or its agency, are not natural gas companies they have so submitted their royalty gas to interstate commerce that they cannot withdraw it without the permission of this Commission. Natural, APGA, the New York Commission and our staff contend that Superior must obtain abandonment before the royalty gas may be withdrawn from sale to Natural and sold to Public Service. Contrary are Public Service, Alaska, Louisiana, Texas, and New Mexico.

Staff argues that where reserves have been dedicated to interstate commerce, in the absence of jurisdiction over Texas or its agency, Superior, a natural gas company is required to satisfy the requirements of the Act which include obtaining partial abandonment authorization prior to diverting the flow in interstate commerce. If the Section 7(b) authorization is granted, the Staff says, the state would be free to take its royalty gas in kind and sell it for resale without any Commission authorization. Where there has been no dedication to interstate commerce, however, then the producer, Superior, would not be required to obtain abandonment authorization.

Natural argues that Section 7(b) was intended to protect consumers and that the jurisdictional seller, Superior, must

obtain prior approval of the partial abandonment. Further, Texas should be viewed as any other nonjurisdictional royalty owner who has elected to take his royalty in kind pursuant to an option, and to allow Superior to ignore the Section 7(b) requirements would allow any producer to divert gas from interstate commerce.

APGA says that the producer, Superior, must seek Section 7(b) abandonment authorization before stopping the sale of any of the gas in question because it is Superior which has the permanent certificate and cannot violate its certificate obligations. APGA objects to gas already committed to interstate commerce being withdrawn and sold to different interstate consumers at unregulated prices. If this is allowed, gas might be sold intrastate, APGA points out.

The New York Commission argues that the objective of Section 7(b) was to protect the consumers from having service upon which they have relied eliminated whenever a seller had the contractual right to terminate. It says there is no material difference to a pipeline or distributor whether the gas sought to be removed from service is owned or controlled by an entity which cannot be a natural-gas company. Therefore, once the state, or an agency, permits a natural gas company to dedicate its interests in gas reserves to interstate commerce the resulting service must be continued until abandonment is authorized.

The opponents variously argue that the Commission has no jurisdiction over a state or its agency and cannot require the producer of the state's royalty gas to obtain abandonment approval. Further, Superior's marketing the royalty gas and making royalty payments cannot alter the nonjurisdictional nature of the original sale. Any other result, they say, would be tantamount to a requirement of prior Commission approval of a state sale of royalty gas, and this would frustrate the Congressional purpose and be in derogation of state sovereignty. Furthermore, a consequence of this position, they add, is that the supply of

natural gas in interstate commerce may be increased. New Mexico takes a different view saying that the only control over Texas can come when it sells its royalty gas in interstate commerce for resale. New Mexico also makes the point that every state is admitted to the Union on an equal footing and, since Alaska is permitted under Section 13(b) of the Alaska Natural Gas Transportation Act of 1976[5] to withdraw gas from the interstate market for use within Alaska, Texas must be permitted to do so also.

As to our authority to require Texas, or its agency, to seek abandonment, we note that Section 7(b) states that "no natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, *or* any service rendered by means of such facilities, without [our] permission . . . ." Texas and its agency are not natural-gas companies. However, the reserves covered by, at least, the first two leases were dedicated to interstate commerce when Superior made the sale to Natural. A certificate was issued covering the first two leases on November 8, 1971, and gas was delivered. Texas did not object to this course of business until on April 25, 1975, when it notified the Commission of its intention to take the royalty gas in kind. Once dedicated, the reserves remain dedicated and this is the result distinct from the underlying contractual arrangement. *Atlantic Refining Co.* v. *N.Y. Pub. Service Comm.*, (CATCO), 360 U.S. 378, 389 (1959); *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137, 152 (1960).

As for the third lease, an amended certificate was issued on February 11, 1975,[6] but we have no definite information available in the record or otherwise as to whether gas was delivered from the third lease to Natural before Texas notified us of its intention to take the royalty in kind. However,

[5] Pub. L. 94-586 (Oct. 22, 1976).

[6] *Skelly Oil Co., supra.*

actual delivery is significant in determining when a commitment to interstate commerce occurred, but not dispositive. In the absence of further information concerning deliveries, we hold that the acceptance of the amended certificate constituted an interstate commerce commitment.

Under these particular conditions, we are of the opinion that the gas from the first two leases that has been dedicated under Section 7(c) of the Act to interstate commerce by a natural-gas company, Superior, became encumbered with the obligations of such dedication including those set forth in Sections 7(e) and 7(b), and Texas or its agency cannot withdraw it from the interstate sale to Natural without the authority of this Commission. As said in *Hunt* v. *F.P.C.*, 306 F.d 334, 342 (CA5-1962), rev'd on other grounds, 376 U.S. 515 (1964) the duty to continue to deliver gas is like an ancient covenant running with the land.

Texas notes that Article 5421C, Section 8 of Vernon's Texas Civil Statutes, provides that the royalty reserved to the State "shall be not less than ⅛th of the gross production or value of oil, gas and sulphur" and argues that under this statute, enacted in 1931, the state has the option either to take its royalty reservation in gross production of the oil or gas or be paid in cash based on the value. Thus it says Superior's certificate of public convenience and necessity does not and cannot apply to the state's royalty share of production.

The statute does not appear to say this. It protects the state from too low a royalty whether the royalty is taken in kind or in money, but does not attempt to provide that the state has a continuing option to take its royalty in kind or in money. It appears that under the original two leases there was no provision for taking the gas in kind. This was not provided until the amendment of January 10, 1974, nor exercised until April 25, 1975. In any case regardless of the meaning of the Texas statute or of the change in the lease

Texas had acquiesced in the sale of gas in interstate commerce, at least with respect to the first two leases.

On question 5 as to whether we can require Superior to obtain abandonment authorization before the Texas royalty gas is sold to Public Service the issue is whether Superior has any service under its leases which it can be required to seek authorization to abandon. In our opinion Superior, a natural-gas company, has clearly dedicated the reserves covered by the original two leases to interstate commerce. As noted above, it received a certificate and gas was delivered and, as in the case of Texas, once dedicated, the reserves remain dedicated. We do not have sufficient information on the third lease.

Since the briefing in the present case the opinion of the Court of Appeals in *Southland Royalty Company* v. *F.P.C.*, —— F.2d —— (5th Cir., Dec. 13, 1976), has been issued. There it was held that when the 50-year fixed-term leases terminated under Texas law the interest of the lessees terminated and the gas reserves in the lease were not subject to actions the lessees might have taken to dedicate the leases to interstate commerce. Here there was no such limitation on the term of any of the leases. The right of Texas to take its royalty in kind was not added until the pooling agreement of January 10, 1974. The first two leases were thus free of any such condition until that date and Superior by agreement with the State cannot contract a previous dedication to interstate commerce away from interstate commerce. We find that this subsequent agreement cannot have the effect of subverting the prior lawful dedication made by Superior. The third lease still remains in effect even if Texas were to take its royalty in kind. In any case the determinations made in *Southland* are still subject to litigation for El Paso Natural Gas Company and the State of California and the Public Utilities Commission of California have petitioned the Supreme Court for a writ of *certiorari* and the Commission will file its petition shortly.

As to the argument that Texas should be treated on an equal footing with Alaska, which can withdraw gas from interstate commerce under the Alaska Natural Gas Transportation Act, there is no reason why Texas should be treated in the same way as Alaska. It is held that when a state is admitted to the Union she becomes possessed of all the rights of dominion and sovereignty which belonged to the original states. *Escanaba Co.* v. *Chicago*, 107 U.S. 678, 688-689 (1883). Texas was admitted into the Union on an equal footing with the original states. *United States* v. *Texas*, 143 U.S. 621 (1892). The requirement of equal footing was not designed to wipe out the diversities of area, location, geology and latitude, but to create parity as respects political standing and sovereignty. *United States* v. *Texas*, 339 U.S. 707, 716 (1950). Thus it was held that airlines operating between the islands of the State of Hawaii were subject to CAB jurisdiction. *Island Airlines* v. *C.A.B.*, 363 F.2d 120, 123 (CA9-1966). The Court said that federal regulations which is otherwise valid is not a violation of the "equal-footing" doctrine merely because its impact may differ between various states because of geographic or economic reasons.

Under the facts here, particularly the acquiescence of Texas in the interstate course of business we conclude therefore that, before Texas' royalty gas from the first two leases can be withdrawn from sale to Natural and transported and delivered to Public Service, Texas, or its agency, and Superior must obtain abandonment authority under Section 7(b) of the Natural Gas Act. Because the briefs fully cover the issues involved there is no need for oral argument as requested by New Mexico.

The Commission further finds:

(1) Neither a state of the United States nor any state agency are natural-gas companies subject to the jurisdiction of the Commission within the meaning of the Natural Gas Act.

(2) The gas reserves representing the royalty of the State of Texas, or an agency, under lease to Superior by Lease Nos. M-58093 and M-58094, in the Gulf of Mexico in Block No. 14-L, High Island Field, Jefferson County, Texas, have been dedicated to interstate commerce, and before it is withdrawn from sale to Natural, Texas, or its agency, and Superior must obtain abandonment authorization under Section 7(b) of the Natural Gas Act.

The Commission orders:

(A) Oral argument is denied.

(B) Within 30 days Superior shall submit a statement with respect to Lease No. M-69629 showing when deliveries to Natural commenced and the amount of deliveries each month through April 1975. Superior should also indicate whether the State of Texas has ever taken its royalty gas in kind from this lease and, if so, when.

(C) Within 30 days of Superior's filing all parties may comment on its legal effect.

(D) The gas reserves representing the royalty of the State of Texas, or an agency, under lease to Superior by Lease Nos. M-58093 and M-58094, in the Gulf of Mexico in Block No. 14-L, High Island Field, Jefferson County, Texas, have been dedicated to interstate commerce, and before it is withdrawn from sale to Natural, Texas, or its agency, and Superior must obtain abandonment authorization under Section 7(b) of the Natural Gas Act.

By the Commission. Commissioner Watt, concurring, filed a separate statement appended hereto.

(SEAL)

Kenneth F. Plumb,
Secretary.

Public Service Company of)
North Carolina, Inc.) Docket No. RP76-103

(Issued April 26, 1977)

WATT, Commissioner, *concurring:*

The present order needlessly addresses issues not before us, and answers those issues in ways with which I cannot now agree.

All that need be decided in this case is whether the right of the State of Texas to take royalty gas in kind, a right which did not come into being until several years after the gas was dedicated to interstate commerce, permits the state to withdraw that gas from interstate commerce without prior abandonment authorization from this Commission. For the reasons set forth in the order limited to this one issue I would find abandonment authorization to be required under the facts of this case.

/s/ JAMES G. WATT
Commissioner

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: RICHARD L. DUNHAM, Chairman; DON S. SMITH, JOHN H. HOLLOMAN III, and JAMES G. WATT.

Docket No. RP76-103

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

Order Setting Question for Briefs and Providing for Additional Notice Period

(Issued October 5, 1976)

On May 24, 1976, Public Service Company of North Carolina, Inc. (Public Service) filed a petition for a declaratory order determining that the Commission is without jurisdiction to require abandonment prior to the transportation in interstate commerce of royalty gas taken in-kind by the State of Texas (Texas).

Superior Oil Company (Superior) presently makes a jurisdictional sale to Natural Gas Pipe Line Company of America (Natural) from two leases in the High Island Area, offshore State of Texas. On January 10, 1974, the Commissioner of the General Land Office on behalf of the State of Texas, together with Superior, and Natural, agreed to amend the existing pooling agreement covering the subject property to add an additional lease to the agreement and to permit Texas, after proper notice, to take its royalty share of gas in-kind.

Superior applied to amend its certificate on August 2, 1974 requesting the addition of the new lease to the dedicated acreage and noting the royalty in-kind provision. On

February 11, 1975, the Commission issued an order amending Superior's certificate and accepting for filing the amendment to add acreage as Supplement No. 3 to Superior's Rate Schedule No. 150. Ordering Paragraph (C) of that order stated that the grant of the certificate was subject to the requirements of Section 7, and that it does not imply approval of all the terms of the contract, especially as they may relate to the cessation of service.

On April 25, 1975, the State of Texas wrote to the Commission giving notice of its intention to take the royalty share in-kind and sell the gas on its own. Texas asserted that it is not subject to the Commission's jurisdiction and does not require a certificate for its action. On June 13, 1975, the Secretary, by direction of the Commission, informed Texas that the February 11, 1975 order did not authorize Superior to divert dedicated gas from the interstate market without abandonment authorization.

On May 1, 1975 Public Service entered into a contract with the "State of Texas, acting by and through the School Land Board of Texas, an agency of the State of Texas," for the sale of the royalty gas. This agreement calls for the sale of approximately 1,100,000 Mcf per year at a rate of $1.44 per Mcf.

The subject of the instant proceeding is the petition of Public Service for a declaratory order that the Commission has no authority to require Texas to seek abandonment authorization of the reserves to be sold by it to Public Service pursuant to their May 1, 1975 contract. Public Service is presently supplied by Transcontinental Gas Pipe Line Company (Transco) but Transco will not transport the Texas gas sale without a Commission ruling that abandonment is not necessary.

Notice of the Public Service petition was issued on June 2, 1976, and appeared in the Federal Register on June 9,

1976 at 41 FR 23248. Petitions to intervene have been filed by American Public Gas Association (APGA), Natural, Tennessee Gas Pipeline Company (Tennessee), and United Gas Pipe Line Company (United). Notices of intervention were filed by the States of Alaska and Louisiana, the Public Service Commission of the State of New York (NYPSC), and the Energy Resources Board of the State of New Mexico and The Commissioner of Public Lands of the State of New Mexico (New Mexico).[1]

Public Service argues that the Commission has no jurisdiction over the State of Texas or its agent and cannot, therefore, require Texas to obtain abandonment authorization prior to making the sale to Public Service. According to the contract, the seller is listed in one place as the "Commissioner of the General Land Office and Chairman of the School Land Board" and in another place as the "State of Texas, acting by and through the School Land Board of Texas, an agency of the State of Texas."

The jurisdiction of the Commission is limited to the regulation of a "natural gas company," which is defined in Section 2(6) of the Natural Gas Act,[2] as a "person" engaged in certain activities. A "person", in turn, is defined in subsection (1) as an individual or corporation. Individual is undefined. A corporation is defined in subsection (2) as:

> any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

---

[1] APGA, NYPSC and The Energy Resources Board of the State of New Mexico and The Commissioner of Public Lands of the State of New Mexico did not file in a timely manner but their respective petitions and notices will be permitted as in the public interest.

[2] 15 U.S.C. § 717a (1963).

Subsection (3) states that a municipality "means a city, or other political subdivision or agency of a State." A state is defined in subsection (4) as a "State admitted to the Union, the District of Columbia, and any organized Territory of the United States."

This is a case of first impression for the Commission. The petition of Public Service sets out a fundamental question of jurisdiction that should be explored fully before the Commission renders its final decision in this matter. Therefore, since there are no apparent questions of fact, the Commission will require initial and reply briefs be submitted directly to the Commission on the following issues:

(1) Within the meaning of Section 2 of the Natural Gas Act, is there any legally applicable difference between a State of the United States and an agency of a State?

(2) Is a State of the United States subject to the jurisdiction of the Commission under the Natural Gas Act?

(3) If a State is a jurisdictional entity, does that automatically make any agency of the State jurisdictional, or is it a separate question then whether the agency is jurisdictional?

(4) If a State is not jurisdictional, can an agency of the State be jurisdictional?

(5) If the Commission has no jurisdiction over a State or an agency of the State, can the Commission then require the present producer of the States' or state agency's royalty share to obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act prior to the State or its agency selling the subject gas in interstate commerce?

We request that the briefs on these issues answer the questions both in the context of the specific factual situation presented in the Public Service petition and generally with reference to State and state agency distinctions, if any. The issues posed and any collateral matters raised by

these questions should be fully and completely explored in the briefs.

We especially invite the comments of all interested persons, whether or not a petition to intervene or notice of intervention has been filed as yet in this proceeding. Because of the importance of the jurisdictional question posed, we will provide an additional period of ten days from the date of issuance of this order for other interested persons to file a petition for intervention or notice to intervene. Persons filing during this period will be required to file copies of the petition or the notice on all parties. The Commission will act on these petitions or notices prior to the date for filing the initial briefs.

The Commission finds:

(1) It is in the public interest that this matter be set for the submission directly to the Commission of briefs on the legal issues posed herein, said briefs can be filed by any party to this proceeding or any other interested person.

(2) Good cause exists to grant the petitions and notices of intervention of APGA, Natural, Tennessee, United, Alaska, Louisiana, NYPSC and New Mexico.

(3) It is in the public interest to provide an additional ten day period in which interested persons may file a petition to intervene or a notice of intervention in order to participate in this proceeding.

The Commission orders:

(A) Initial briefs on the legal issue posed herein, and any related legal questions, should be filed on or before November 5, 1976, with replies thereto to be filed on or before November 30, 1976.

(B) APGA, Natural, Tennessee, United, Alaska, Louisiana, NYPSC, and New Mexico are permitted to intervene in this proceeding for relief subject to the Rules and

Regulations of the Commission; *Provided, however,* that the participation of such intervenors shall be limited to matters affecting asserted rights and interests as specifically set forth in their petitions for leave to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any order or orders of the Commission entered in these proceedings, and that the intervenors agree to accept the record as it now stands.

(C) Any person desiring to be heard or to protest the Public Service filing should file a petition to intervene or protest with the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, and all other parties to the proceeding, in accordance with Section 1.8 and 1.10 of the Commission's Rules of Practice and Procedure (18 CFR 1.8 and 1.10). All such petitions or protests should be filed within ten days of the issuance of this order. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of the Public Service filing are on file with the Commission and are available for public inspection.

By the Commission.

(SEAL)

LOIS D. CASHELL,
Acting Secretary.

APPENDIX F

Statutes

Section 2 of the Natural Gas Act of 1938, 15 U.S.C. § 717b, reads in relevant part as follows:

SEC. 2. When used in this act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

Section 7(b) of the Natural Gas Act of 1938, 15 U.S.C. § 717f(b), reads as follows:

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Nos. 78-1585 and 78-1681

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF LOUISIANA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

STATE OF TEXAS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B)[1] is reported at 587 F.2d 716. The opinions and orders of the Federal Power Commission[2] (Pet. Apps. C and D) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1979 and its order denying a petition for rehearing (Pet. App. A) was issued on February 8, 1979. The petition for a writ of certiorari in No. 78-1585 was filed on April 16, 1979 and in No. 78-1687 on May 7, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a state may divert to another purchaser gas it owns that was previously dedicated to

[1] Unless otherwise indicated, all citations herein to the actions of the court of appeals and the Commission will be to the appendices in the State of Louisiana's petition, cited as "Pet. App." "R." refers to the certified record before the court of appeals.

[2] Pursuant to the provisions of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (to be codified as 42 U.S.C. 7101 *et seq.*), the Federal Power Commission ceased to exist on September 30, 1977 and most of its functions and regulatory responsibilities, including those relevant to this case, were assumed by the Federal Energy Regulatory Commission effective October 1, 1977. Hereinafter, the term "Commission" refers to the FERC or the FPC depending on whether the events referred to occurred before or after October 1, 1977.

an interstate pipeline by the state's lessee, without prior authorization from the Commission under Section 7 of the Natural Gas Act to abandon service to the pipeline.

2. Whether a requirement that states obtain abandonment authority under Section 7 of the Natural Gas Act unconstitutionally intrudes upon state sovereignty.

STATUTE INVOLVED

Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience and necessity permit such abandonment.

STATEMENT

On June 1, 1965, the State of Texas, through its School Land Board, leased to Superior Oil Company ("Superior") certain state owned acreage offshore

from Texas (Texas Pet. 3).[3] On May 7, 1971, Superior contracted with Natural Gas Pipeline Company of America ("Natural") to sell to Natural for resale the natural gas produced from the leased area (Pet. App. 5a, 16a).

Superior obtained from the Federal Power Commission a certificate of public convenience and necessity authorizing the sale under Section 7 of the Natural Gas Act, 15 U.S.C. 717f, and service commenced (Pet. App. 4a-5a).[4]

Under the original leases Texas did not take its royalty payments in kind (Pet. App. 4a n.5); instead, Superior sold all of the gas produced and Texas received its royalties in the form of a share in the proceeds from the sale. However, in January 1974, Texas, Superior and Natural entered into a new agreement which, *inter alia*, authorized Texas at its option to require payment of all royalties in kind (Pet. App. 5a; R. 17).[5] The Commission granted Superior's request for an amendment in its certificate

[3] Petitioner Louisiana intervened in the Commission proceedings (Pet. App. 21a) and petitioned the court of appeals for review of the Commission's order (Pet. App. 3a). Louisiana, however, has no interest in any of the gas involved in this case.

[4] The Commission's certificate was of unlimited duration, as was the term of the lease between Texas and Superior (Pet. App. 30a).

[5] Texas also retained the right from time to time to deliver the gas under the Superior-Natural sale/purchase agreement (R. 18). The provision of the agreement dealing with royalty shares also established that the rights and obligations of Superior and Natural were subject to receipt of all necessary Commission approvals (*ibid.*).

to reflect the January 1974 agreement, but noted that it was not approving all of the terms of the agreement. It specifically observed that it was not granting the abandonment authority which Superior was required to obtain under Section 7(b) of the Act before certificated service could be terminated (Pet. App. 20a).

On April 25, 1975, Texas notified the Commission that effective May 1, 1975, it was electing to take its option royalty in kind (Pet. App. 5a, 20a). Effective the same day Texas contracted with Public Service Company of North Carolina, Inc. ("Public Service") for that company to buy for a limited period Texas' royalty gas (Pet. App. 5a, 20a; R. 10-14).

However, Transcontinental Gas Pipeline Co. ("Transco"), the only company with the capacity to transport the gas (R. 2), would not agree to do so until the Commission ruled that it did not have to approve abandonment of Superior's service to Natural (Pet. App. 20a). Public Service accordingly petitioned the Commission for a declaratory order that the Commission had no authority under the Natural Gas Act to require abandonment authorization before the royalty gas could be transported by Transco (*id.* at 5a, 19a).

The Commission held that neither Texas nor its leasing agency was a natural gas company within the terms of the Natural Gas Act (Pet. App. 25a). However, since Texas had chosen to do business through a regulated natural gas company and that company had dedicated the gas, Texas was bound by the obligation to serve Natural adhering under fed-

eral law to the gas pursuant to the previously issued certificates (*id.* at 29a). The Commission therefore required Superior and Texas to obtain abandonment authority before Texas would be permitted to divert the gas to Public Service (*id.* at 32a).

The court of appeals affirmed (Pet. App. 3a-13a). Accepting the Commission's determination that Texas was not a natural gas company for purposes of the Natural Gas Act, the court, relying on *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978), held that the combination of circumstances present in this case had given rise to a continuing service obligation which required Commission authorization before certificated service could be abandoned (Pet. App. 10a). The court concluded that the service obligation had attached to the gas when it was certificated and service began, and that it was immaterial that Texas was not a natural gas company because it is the dedication of the gas, not the identity of the party, that creates the service obligation (*id.* at 7a-10a). The court further held that this result is not an unconstitutional intrusion on state sovereignty under *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), because the state's business operation is "indistinguishable from like commercial activities of private business" (Pet. App. 12a).

ARGUMENT

The decisions of the Commission and the court of appeals in this case reflect a narrow application of the principle underlying *California* v. *Southland*, 436

U.S. 519 (1978), that once natural gas has been dedicated to interstate service, " 'there can be no withdrawal of that supply from continued interstate movement without Commission approval.' " *United Gas Pipeline Co.* v. *McCombs*, Nos. 78-17 and 78-249 (June 18, 1979), slip op. 13. The court of appeals correctly held that ownership by a State of some of the previously dedicated gas creates no exception to this "fundamental component of the regulatory scheme." *McCombs, supra*, slip op. 8. There is no reason for the Court to re-examine the question under the terms of the Natural Gas Act. And since all that is involved is regulation of business activity by a State in the interstate gas market, no impermissible intrusion into inherently governmental activities of the States results.

1. In *California* v. *Southland Royalty Co., supra*, the Court held that once natural gas has been dedicated to an interstate service within the Commission's jurisdiction, that service must continue until abandonment of that service is authorized under Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), without regard to any intervening changes in the relationships between the lessee and the lessor of the producing properties.[6]

[6] In *Southland*, the lessor of gas-producing acreage dedicated the production to interstate commerce. When the lease expired, the lessor-reversioner sought to sell the remaining reserves in intrastate commerce. The Court held that the gas was subject to "a federal obligation to serve the interstate market until abandonment authorization had been obtained."

Under *Southland* it is the regulatory status of the gas, not the legal status of those with interests in its production, that renders Section 7 controlling. Intervening "[p]rivate contractual arrangements might shift control of the [gas] and thereby determine *who* is obligated to provide that service, but the parties may not simply agree to terminate the service obligation without the Commission's permission." 436 U.S. at 527. The court of appeals thus correctly held "that an entity's status as a 'natural gas company' is largely irrelevant to the question of whether that entity must seek abandonment authorization under § 7(b)" (Pet. App. 7a).

The court of appeals also correctly rejected petitioners' claim that *Southland* is distinguishable because a state can never be a natural gas company. As the court of appeals explained (Pet. App. 9a):

> Petitioners seek to distinguish the instant case from *Southland* on the grounds that the owners of the reversionary interest in *Southland* could become "natural gas companies," while Texas can never achieve this status. This may well be true. The argument, however, overlooks the major point of *Southland*—that it is the *dedication* of the gas that creates the service obligation. Indeed, in *Southland*, the Court refused to reach the question of whether the owners were "natural gas companies." Instead, the Court pointed out that whether or not the owners were "natural gas companies" was "[largely] beside the point, for the obligation to serve the interstate market had already attached to the *gas*, and respondents became obligated to continue that servive when they assumed control of the gas." *Id.* at 528, 98 S.Ct. at 1960.

436 U.S. at 526. This obligation prevailed over the parties' private contractual arrangements and state property law defining interests in gas and gas-producing acreage.

This conclusion finds strong support in recent legislation.

First, in the Alaska Natural Gas Transportation Act of 1976, Pub. L. No. 94-586, 90 Stat. 2903, 15 U.S.C. 719 *et seq.*, Congress included a provision specifically authorizing the State of Alaska to withdraw royalty gas from "the interstate market" (Section 13(b), 15 U.S.C. 719k(b)),[7] but only on certain conditions. Thus, Section 13(b) of that Act specifies that such withdrawal is permitted only "to the extent its contracts for the sale of royalty gas so provide," and directs the Commission to "issue all authorizations necessary to effectuate such * * * withdrawal." These provisions would have been unnecessary if states already had authority under the Natural Gas Act to withdraw royalty gas without Commission approval under Section 7(b) merely because

[7] Section 13(b) provides:

> The State of Alaska is authorized to ship its royalty gas on the approved transportation system for use within Alaska and, to the extent its contracts for the sale of royalty gas so provide, to withdraw such gas from the interstate market for use within Alaska; the Federal Power Commission shall issue all authorizations necesary to effectuate such shipment and withdrawal subject to review by the Commission only of the justness and reasonableness of the rate charged for such transportation.

they were not "natural gas companies." The implication is that Congress believed states other than Alaska have no such authority.

Second, in the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 ("NGPA"), Congress reviewed this Court's decision in *Southland* and specifically provided for certain limitations on its future extension that are not pertinent here,[8] but it did not disturb *Southland's* basic holding as applied to gas that, as here, was dedicated to interstate commerce prior to the date of the decision. Moreover, the NGPA contains a special pricing provision for the royalty or other interests of states in natural gas, but that provision expressly does not apply to "natural gas which was * * * committed or dedicated to interstate commerce [under the Natural Gas Act] on the day before the date of the enactment of this Act * * *." Section 106(b)(2)(A) of the NGPA, 92 Stat. 3365. This further confirms that a state's roy-

[8] See Section 2(18) of the NGPA, 92 Stat. 3354. Section 2(18)(A)(ii) defines for purposes of the 1978 Act, gas that is "committed or dedicated to interstate commerce" as gas "which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act." Section 2(18)(B)(iii) excludes from this definition gas that was not being sold in interstate commerce on May 31, 1978, if on that date neither the person who caused the gas to be dedicated or such person's successor in interest (other than a reversionary lessor) "had any right to explore for, develop, produce, or sell such natural gas." Since the gas involved here was being sold in interstate commerce on May 31, 1978, the exclusion is inapplicable.

alty interest in dedicated gas is subject to established concepts of dedication under the Natural Gas Act.

The ruling of the court of appeals is, in any event, a proper application of the basic purpose of the Natural Gas Act as identified in *Southland* and other cases. The requirement that abandonment be authorized by the Commission under Section 7 is intended "to protect those communities presently depending on the flow of gas pursuant to a certificate of unlimited duration already issued." *Southland Royalty Co.*, *supra*, 436 U.S. at 530; *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 142, 156 (1960). The protection afforded to such communities would be significantly vitiated if, pursuant to the terms of agreements between private producers and states, dedicated natural gas could be withdrawn from an interstate market at will.

For the reasons identified in *Southland*, there is no inequity or inconsistency with the regulatory scheme in holding lessor-states, like lessors who are private parties, to the service obligations of the Natural Gas Act. By authorizing Superior to sell its gas under an interstate certificate to Natural, Texas itself authorized changes in the regulatory status of the gas that could be annulled only by the means Congress has specified. See *United Gas Pipeline Co.* v. *McCombs*, *supra*. The Court's description of the private lessors in *Southland* applies equally to Texas and its agencies in this case, which are " 'mineral lease owners who entered into a lease that permitted the lease holders to make interstate sales.' * * * They did not object when [Superior] sought a certificate

from the Commission. * * * Having authorized [Superior] to make interstate sales of gas, [petitioners] could not have expected those sales to be free from the rules and restrictions that from time to time would cover the interstate market." *Southland Royalty Co., supra,* 436 U.S. at 528-529.

2. Contrary to the claim of petitioner Texas (Texas Pet. 15-16), application of the regulatory requirements in Section 7 of the Natural Gas Act to gas in which a State has an interest does not unconstitutionally intrude upon State sovereignty by displacing "the States' freedom to structure integral operations in areas of traditional governmental functions * * *." *National League of Cities* v. *Usery,* 426 U.S. 833, 852 (1976). To the extent that a State enters the arena of commerce by selling its natural resources in the interstate marketplace, it is subject to Congress' paramount power to regulate interstate commerce. "It should be evident * * * that the running of a business enterprise is not an integral operation in the area of traditional government functions." *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 424 (1978) (Burger, C.J., concurring). Accord, *National League of Cities, supra,* 426 U.S. at 854, n.18; *United States* v. *California,* 297 U.S. 175 (1936); *Parden* v. *Terminal Ry.,* 377 U.S. 184 (1964); *California* v. *Taylor,* 353 U.S. 553 (1957). Even if regulation under the Natural Gas Act has an incidental effect on Texas' ability to generate revenues devoted to schools or other uses,[9] the court of appeals correctly held that such an effect "comes nowhere near constituting a federal usurpation of state control over public education in Texas" (Pet. App. 12a). See also *National League of Cities, supra,* 426 U.S. at 856 (Blackmun, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1979

[9] This Court has long rejected the suggestion that federal regulation is impermissible if it impinges on a state's revenue raising opportunities. See, *e.g., FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 608, 612-614 (1944). Cf. *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 822 n.114 (1968); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 534 (1941).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-1585 and 78-1681

STATE OF LOUISIANA,
Petitioner,

STATE OF TEXAS,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENT NATURAL GAS PIPELINE COMPANY OF AMERICA.

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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IN THE

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENT NATURAL GAS PIPELINE COMPANY OF AMERICA.

Natural Gas Pipeline Company of America (Natural), a respondent herein and an intervenor in the court below, opposes the petitions for writ of certiorari filed by the State of Louisiana (Louisiana) and the State of Texas (Texas) to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-captioned proceeding. The opinion of the Fifth Circuit is reported *sub nom. Public Service Company of North Carolina, et al.* v. *Federal Energy Regulatory Commission* at 587 F. 2d 716 (1979).

QUESTION PRESENTED.

Whether the Court of Appeals correctly affirmed orders[1] of the Federal Power Commission (now succeeded by the Federal Energy Regulatory Commission, collectively referred to herein as "Commission") requiring that abandonment approval be obtained pursuant to Section 7(b) of the Natural Gas Act prior to the State of Texas' (Texas) withdrawing gas from service in interstate commerce.

STATEMENT.

The underlying facts involve a sale of gas in interstate commerce for resale by Superior Oil Company (Superior), to Natural, a major interstate gas pipeline. Both Natural and Superior are natural gas companies subject to the jurisdiction of the Commission. The gas sold by Superior to Natural includes gas which is attributable to the royalty share of Texas, the lessor of the leases from which the gas is produced.

Pursuant to a pooling agreement dated January 1974, Texas was given the option to take its royalty gas in kind. The pooling agreement between Superior, Texas and Natural stated "[t]he rights and obligations of Superior and Natural shall be subject to the receipt and acceptance of any and all necessary approvals of the Federal Power Commission". Texas exercised its option to take gas in kind.

On April 25, 1975, Texas by letter advised the Commission that Texas would take its royalty gas in kind. The Commission by letter to Texas dated June 13, 1975 stated Superior had not been authorized to divert gas from the interstate market without abandonment approval. On May 1, 1975, Texas, on behalf of

1. *Public Service Co. of North Carolina, Inc.,* FPC Docket No. RP76-103, Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandonment Authorization, and Denying Oral Argument (issued April 26, 1977) and Order Denying Rehearing (issued July 6, 1977).

the School Land Board of Texas, an agency of Texas, entered into a gas purchase agreement to sell the royalty gas to Public Service Company of North Carolina, Inc. (Public Service).

More than a year later, Public Service filed a petition for declaratory order with the Commission asking

> [t]hat the Commission issue a declaratory order determining that it has no jurisdiction under the Natural Gas Act to require that abandonment authority be sought prior to the sale and delivery of the State of Texas' royalty gas to Public Service.

The Commission requested briefs concerning the jurisdiction of the Commission over the proposed withdrawal of gas from service to Natural. Natural and others responded to the Commission's request. Natural's brief emphasized that abandonment approval must be obtained before withdrawing gas from service to Natural.

On April 26, 1977, the Commission issued a declaratory order that "Texas, or its agency, *and Superior* must obtain abandonment authorization under Section 7(b) of the Natural Gas Act" before the subject gas could be withdrawn from sale to Natural. *Public Service Co. of North Carolina, Inc.,* Docket No. RP76-103, Order (issued April 26, 1977). Emphasis added.

Public Service, Texas and Louisiana filed applications for rehearing with the Commission. Rehearing was denied by the Commission on July 6, 1977. Petitions for review of the Commission's April 26, 1977 and July 6, 1977 orders were filed in the Fifth Circuit by Public Service, by Texas and by Louisiana.

The Fifth Circuit upheld the Commission orders. Although the Fifth Circuit made no independent holding on Superior's abandonment duty, the court ordered that the Commission's orders be "ENFORCED". 587 F. 2d at 721. The Commission's orders held that both Texas and Superior must obtain abandonment

authority.[2] In the body of its opinion, the court recognized that the Commission's orders dealt with Superior's duty to obtain abandonment approval.[3] The court recited the following language from the Commission's Declaratory Order:

> Texas, or its agency, *and Superior must obtain abandonment* authority under Section 7(b) of the Natural Gas Act.

Id. at 718. Emphasis added. Furthermore, the court stated

> since we find that the Commission can directly require Texas to seek abandonment, we need not consider Texas's argument that such could not be done indirectly through Superior.

Id. at 719, n. 11.

REASONS FOR DENYING THE WRIT.

The writ should be denied. In their petitions, Texas and Louisiana have argued that the Commission's orders constitute an "unprecedented extension of Commission jurisdiction over states and state agencies". However, the jurisdictional status of the gas itself, not the parties, is the key issue. The gas at issue is dedicated to service to Natural in interstate commerce, remains subject to the Commission's jurisdiction under the Natural Gas Act, and cannot be withdrawn from service to Natural prior to Commission issuance of abandonment approval. Because Superior, the jurisdictional producer, must obtain abandonment approval before withdrawing gas service from Natural, any determination of Texas' and Louisiana's claims of "unprecedented extension of Commission jurisdiction", even if resolved in their favor, would still not dispose of the underlying abandonment issue. Therefore, such claims do not offer sufficient grounds for this Court to grant certiorari.

2. At this time, neither Superior nor Texas has applied for or received abandonment approval from the Commission.

3. Briefs filed in the Fifth Circuit which dealt with Superior's abandonment approval include Initial Brief of the State of Texas, at pages 20-27, Brief for Respondent Federal Energy Regulatory

(Footnote continued on next page.)

I.

The Commission Has Jurisdiction Over the Gas Regardless of Texas' Interest in the Gas Under State Law.

The Court of Appeals correctly held that a continued service obligation attached to the subject gas regardless of Texas' involvement. Therefore, abandonment approval is required by Section 7(b) of the Natural Gas Act prior to the withdrawal of the gas from service to Natural. Obtaining such abandonment approval is required of the producer, Superior, regardless of Texas' involvement.

Questions of whether a state is a "natural-gas company" and whether a state can be subject to the abandonment provisions of the Natural Gas Act need not concern the Court in this case. The significant fact is that the gas has been dedicated to service to Natural in interstate commerce and remains so dedicated, regardless of Texas' interest in the gas under state law. Only after abandonment approval is obtained may the gas be withdrawn from the jurisdictional service to Natural. The gas remains subject to the Commission's jurisdiction regardless of the fact that Texas is the owner of a royalty interest in the jurisdictional gas. Superior, the jurisdictional producer, must obtain abandonment approval.

As Texas itself recognized in its Initial Brief before the Fifth Circuit, a ruling

> that Texas need not obtain abandonment authorization but Superior must, still gives Commission veto power over any disposition Texas wishes to make of its royalty gas.

Id. at 21. In light of the obligation of Superior, a jurisdictional producer, to obtain abandonment approval prior to withdrawing gas from jurisdictional service to Natural, any determination of the claimed "extension of Commission jurisdiction over states",

(Footnote continued from preceding page.)

Commission, at pages 23-24, Initial Brief of Public Service Company of North Carolina, Inc., at pages 18-23, and Brief of Intervenor Natural Gas Pipeline Company of America at pages 6-13.

even if resolved in Texas' and Louisiana's favor, would not be dispositive of the underlying abandonment issue, and, therefore, such claims would not constitute sufficient grounds for this Court to grant certiorari.

II.

Abandonment Approval Is Required Before Withdrawing Any Gas from Jurisdictional Service to Natural.

Section 7(b) of the Natural Gas Act provides in fuli

> [n]o natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

15 U. S. C. § 717f(b).

There is no exception to the requirement that abandonment approval be obtained prior to withdrawing gas from jurisdictional service. The subject sale of the royalty gas by Superior to Natural is "service" within the meaning of Section 7(b). It is well established that Section 7(b) applies to sales made by producers to interstate pipelines. Such sales constitute "service" within the meaning of this Section. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137 (1960); *Atlantic Refining Co.* v. *Public Service Commission*, 360 U. S. 378 (1959); *Hunt Oil Co.* v. *FPC*, 334 F. 2d 474 (5th Cir. 1964); *Michigan Consolidated Gas Co.* v. *FPC*, 283 F. 2d 204 (D. C. Cir. 1960), *cert. denied*, 364 U. S. 913 (1960); *J. M. Huber Corp.* v. *FPC*, 236 F. 2d 550 (3d Cir. 1956), *cert. denied*, 352 U. S. 971 (1956).

Section 7(b) was intended to protect consumers of interstate gas. *Sunray Mid-Continent Oil Co.* v. *FPC*, *supra*. The Commission can carry out the purposes of Section 7(b) only through an examination of each factual situation to determine whether the proposed abandonment can be authorized in compliance with the statutory standards. That the subsequent disposition is intended to be made by a non-jurisdictional entity, Texas, is of no relevance to the issue of whether a jurisdictional seller, Superior, must obtain approval prior to withdrawing the gas from jurisdictional service.

California v. *Southland Royalty Co.*, 436 U. S. 519 (1978), decided by this Court last term, held that gas subject to a lease which under state law had reverted to the lessor cannot be withdrawn from interstate service prior to receipt of abandonment approval because "the obligation to serve the market had already attached to the *gas*". *Id.* at 528; emphasis in original. *Southland* recognizes and gives effect to two longstanding basic principles consistently applied by this Court in construing the Natural Gas Act. One principle is that jurisdiction follows the physical flow of gas. *See California* v. *Lo-Vaca Co.*, 379 U. S. 366 (1965). The other principle is that the abandonment provisions of Section 7(b) of the Natural Gas Act are of foremost importance. *See Sunray Mid-Continent Oil Co.* v. *FPC*, *supra*.

There is no reason for this Court to depart from its position in *Southland* which controls disposition of the instant case. In both *Southland* and the present case, provision was made under state law for return of all or a portion of the gas to the lessor. In both *Southland* and the present case, the lessors desired to divert the gas from jurisdictional service. A vital concern of this Court and the Commission under the Natural Gas Act is the protection of service to consumers. *See, e.g., Sunray Mid-Continent Oil Co.* v. *FPC*, *supra*. Texas' role as a royalty owner of gas used to provide a jurisdictional service cannot be used to abridge the protections provided consumers by the Natural Gas Act.

Because the obligation to serve consumers in the interstate market attached to the gas, Superior is required to obtain abandonment approval.

Since the gas has been dedicated to interstate commerce, abandonment authorization must be obtained prior to withdrawal of the gas from service to Natural. Even if Texas were not required tc obtain such abandonment approval, Superior, the producer, would nevertheless be subject to the statutory abandonment provision.

CONCLUSION.

For the reasons set forth above, the petitions for writ of certiorari should be denied.

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IN THE

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**BRIEF IN OPPOSITION FOR RESPONDENT
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK**

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

The Public Service Commission of the State of New York (New York), a respondent herein and an intervenor in the case below, opposes the petitions for writ of certiorari filed by the State of Louisiana and the State of Texas to review the judgment of the United States Court of

Appeals for the Fifth Circuit in the above-captioned proceeding. The opinion of the Fifth Circuit is reported *sub nom. Public Service Company of North Carolina, et al.* v. *Federal Energy Regulatory Commission* at 587 F.2d 716 (1979).

QUESTION PRESENTED

New York adopts the question presented as framed by the Respondent Federal Energy Regulatory Commission (Commission) in its opposition to the petitions for certiorari in the above-captioned proceeding.

STATEMENT

The statement of the underlying facts in this case, as presented by the Commission in its opposition to the petitions for certiorari, is hereby adopted by New York as its statement of the case.

REASON FOR DENYING THE WRIT

New York believes that the opinion below, which is carefully restricted to its peculiar facts, is clearly valid in its own terms. Moreover, while we agree with the court below that affirmance of the Commission's decision is required under the rule laid down by this Court in *California* v. *Southland Royalty Company*, 436 U.S. 519, we are convinced that the Commission's decision was

independently supportable, and so argued to the Court of Appeals. We shall not, however, burden the Court with a detailed analysis of our views of the law since this would only duplicate the opposition to be filed by the government.

New York does wish to point out why, contrary to the peititioners, we believe no substantial question of public policy exists which would warrant grant of the petitions and plenary consideration of the case by the Court. While the State of New York is primarily a consumer of natural gas rather than a producer, we joined the petitioners in arguing before the respondent Commission that a state was not and could not become a "natural gas company" under the Natural Gas Act. The Commission so held[1] and the Court of Appeals did not disagree. All the court held is that where the state, as lessor, acquiesces in Commission certification of a sale of natural gas and its interstate transmission by a natural gas pipeline, the state cannot subsequently exercise rights to take the gas in kind for different disposition, in the absence of Commission authorization, pursuant to Section 7(b) of the Natural Gas Act, to abandon the certificated service.

This determination was of significance to both states of production, like the petitioners, and states of consumption, like New York, as long as the law, in the

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[1] *Public Service Co. of North Carolina, Inc.*, FPC Docket No. RP76-103, Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandoning Authorization, and Denying Oral Argument (issued April 26, 1977), p. 8.

absence of such a restriction, would have permitted the state lessor to withdraw gas from the interstate pipeline whenever it believed it could secure a better price by taking its royalty interest in kind and reselling it at a higher price than the lessee producer had secured from the interstate sale pursuant to the regulatory restraints of the Natural Gas company. However, the recent enactment of the Natural Gas Policy Act of 1978 (NGPA), Public Law No. 95-621, 15 U.S.C. §3301, *et seq.*, has drastically changed the legal situation and effectively removed the economic impetus for such withdrawals. Specifically, under the NGPA, sales of gas by states are now subject to the various price ceilings of Title I of the Act and these ceilings apply both to intrastate sales (See Sections 105 and 106(b)) and to direct sales, as well as sales for resale. (See Section 101(b)).

The result of these changes is to remove virtually all financial incentive for a state to attempt to withdraw its royalty share of gas previously dedicated to interstate commerce in order to resell this gas in what previously was the unregulated intrastate market or by way of a previously unregulated direct sale. Moreover, the NGPA, by eliminating the date of sales contract as the basis for determining the applicable rate and substituting therefore various fixed physical events or factors for determining the particular price category into which a sale falls, has removed any inducement to a state to withdraw gas from a previously certificated interstate sale in order to secure higher prices which might have been authorized for sales pursuant to contracts entered into after the date of the original certification.

Under these circumstances the Commission's ruling, as affirmed by the Court below, has no general significance even in the narrow but then important framework to which it was initially restricted.[2] In fact, since the gas in question in the particular case determined by the Commission was "committed or dedicated to interstate commerce" as of the date of enactment of the NGPA and a just and reasonable rate for the sale under the Natural Gas Act was in effect on such date, the ceiling price which the state lessor could receive for its royalty share under Section 104 of the NGPA is the same as the ceiling applicable to the sale by the lessee Superior Oil Company.

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[2]Under Section 601(a)(1)(b) of the NGPA, the abandonment provisions of Section 7(b) of the Natural Gas Act will no longer apply to wells whose surface drilling commenced after February 19, 1977, which qualify for treatment under Sections 102 and 103 of the Act. This action undoubtably reflects Congressional recognition that its elimination of the regulatory dichotomies between interstate and intrastate sales and between direct sales and sales for resale, had eliminated the financial impetus for sellers diverting gas from the service to which it had been initially committed.

CONCLUSION

The decision below is not only correct in its own terms but relates to a problem which has been rendered obsolete by subsequent legislation. The petitions for certiorari should be denied.

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